MAR 12 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1152

WILLIAM ARTEMIS and
MICHAEL RAIFE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LUKE McKISSACK
Attorney at Law
Suite 521
6430 Sunset Boulevard
Hollywood, California 90028

(213) 466-7331

Attorney for Petitioners,
William Artemis and
Michael Raife

IN THE

SUPREME COURT OF THE UNITED STATES

---

October Term, 1974

No. _____

WILLIAM ARTEMIS and
MICHAEL RAIFE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

---

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

LUKE McKISSACK
Attorney at Law
Suite 521
6430 Sunset Boulevard
Hollywood, California 90028

(213) 466-7331

Attorney for Petitioners,
William Artemis and
Michael Raife

## TOPICAL INDEX


| | Page |
|---|---|
| Petition..... | 1 |
| Opinion Below..... | 2 |
| Grounds on which the jurisdiction of this Court is invoked..... | 2 |
| Questions presented for review... | 3 |
| Constitutional Provisions and Statutes Involved..... | 5 |
| Statement of the Case..... | 5 |
| Statement of Facts..... | 11 |
| Reasons for granting the writ and amplifying the same..... | 33 |
| I | |
| Petitioners were denied their right to a speedy trial under the Sixth Amendment to the United States Constitution and the Due Process Clause of the Fifth Amendment to the Federal Constitution..... | 33 |
| II | |
| The Government's refusal to make available the identities whereabouts and other impeaching information of its two key informant-accomplice-witnesses in advance of trial so that the defense could | |

prepare its case denied Petitioners due process of law under the Fifth Amendment to the Unites States Constitution..... 55

III

Petitioners were denied a fair trial by submission to the jury of statements of the primary government witness which were known to be false..... 62

IV

The presentation, which was probably intentional, of evidence that the principal government witness had taken and passed a polygraph examination was incurable, prejudicial error..... 70

V

Admission of Hearsay evidence of an uncharged and unproved crime relative to the Forabosco painting deprived petitioners of a fair trial.... 82

VI

The consecutive sentences on counts One and Two are invalid as violative of the due process clause of the Fifth Amendment to the United States Constitution and without foundation in Legislative intent..... 91

Conclusion..... 94

INDEX TO APPENDIX

APPENDIX "A" - Opinion of the Court below..... 1

TABLE OF AUTHORITIES


| | Page |
|---|---|
| Barker v. Wingo 92 S. Ct. 2182 407 U.S. 541 (1972) | 33,42,46, 80,81 |
| Bell v. United States (1955) 359 U.S. 81, 75 S. Ct. 620 99 L. Ed. 905 | 92 |
| Brady v. Maryland 373 U.S. 83 (1963) | 57,61,75 |
| Campopiano v. United States (No. 71-1028) 446 F.2d 869 | 41 |
| Erwing v. United States (C.A. 9, 1961) 296 F.2d 320 | 88 |
| Gibson v. United States (C.A. 5, 1966) 363 F.2d 146 | 77,78 |
| Giglio v.United States 405 U.S. 150 (1972) | 66,67,68, 69 |
| Giles v. Maryland 386 U.S. 73 S. Ct. 1640 (1967 | 58 |
| Hamric v. Gailey (4th Cir. 1967) 386 F.wd 391 | 58 |
| Heflin v. United States (1959) 358 U.S. 405, 79 S. Ct. 451 3 L. Ed. 2d 407 | 92 |
| In re Gault 387 U.S. 1 (1967) | 82 |

In re Snow (1887)
120 U.S. 274, 7 S. Ct. 556
30 L. Ed. 658 92

Jackson v. Wainwright
(5th Cir. 1968)
390 F.2d 288 58

Jones v. Superior Court
3 Cal. 3d 737
91 Cal. Rptr. 578 (1971) 46

Ladner v. United States (1958)
359 U.S. 169, 79 S. Ct. 309
3 L. Ed. 2d 199 92

Lee v. United States
(9th Cir. 1968)
388 F.2d 738 58,59

Lorraine v. United States
(9th Cir. 1968)
396 F.2d 339 58

Lyda v. United States
(C.A. 9, 1963)
321 F.2d 788 88

Milanovich v. United States
365 U.S. 551, 81 S. Ct. 728
5 L. Ed. 2d 773 91

Mooney v. Holohan (1935)
294 U.S. 103 66

Napue v. Illinois (1959
360 U.S. 259 66,67,68

Orr v. United States
(D.C. Cir. 1967)
386 F.2d 988 58

People v. Alvarez
154 Cal. 2d 694
316 P.2d 1006 (1957) 56

People v. Andrews (1970)
14 Cal. App. 3d 40 77

People v. Blackwell
256 Cal. App. 2d 313
64 Cal. Rptr. 642 (1967) 93

People v. Carter (1957
48 C.2d 737 77

People v. Castiel
153 Cal. 2d 653
315 P.2d 79 (1957) 56

People v. Diaz
174 Cal. App. 2d 799
345 P.2d 370 (1959) 56

People v. Durazo
53 Cal. 2d 354
340 F.2d 594 (1959) 56

People v. Gant
60 Cal. Rptr. 252
154 Cal. App. 2d 101 (1967) 93

People v. Garcia
67 AC 57
64 Cal. Rptr. 110 (1967) 56

People v. Hammond
54 Cal. 2d 846
9 Cal. Rptr. 233 (1960) 56

People v. Kiihoa
53 Cal. 2d 749
3 Cal. Rptr. 1 (1960) 56

People v. Lawrence
149 Cal. App. 2d 435
308 P.2d 821 (1957) 56

People v. Parella (1958)
158 Cal. App. 2d 140 77

People v. McShann
50 Cal. 2d 808
330 P.2d 33 (1958) 56,57

People v. Montano
244 Cal. App. 2d 555
53 Cal. Rptr. 145 (1966) 56

People v. Perez
62 Cal. 2d 769
44 Cal. Rptr. 326 (1965) 56, 57

People v. Prince
268 Cal. App. 2d 398
74 Cal. Rptr. 197 (1969) 93

People v. Scott
259 A.C.A. 268
66 Cal. Rptr. 257 (1968) 56

People v. Williams
51 Cal. 2d 355
333 P.2d 19 (1958) 56

Portomene v. United States
221 F.2d 582 (1955) 56

Prince v. United States (1957)
352 U.S. 322, 77 S. Ct. 403
1 L. Ed. 2d 370 92

Rewis v. United States (1971
401 U.S. 808, 91 S. Ct. 1056
28 L. Ed. 2d 493 92

Roviaro v. United States (1957)
353 U.S. 53 55,61

Sachs v. United States
(C.A. 9, 1960)
281 F.2d 189 85

Strunk v. United States
93 S. Ct. 2260 (1973) 41

Teasley v. United States
(C.A. 9, 1961)
292 F.2d 460 85

United States v. Bass (1961)
404 U.S. 336, 93 S. Ct. 515
30 L. Ed. 2d 488 92

United States v. Clements
(9th Cir. 1972)
471 F.wd 1253 91

United States v. D'Angiolillo
(2d Cir. 1965))(Cert. den.)
350 F.2d 453, 380 U.S. 955 55

United States v. DeBetham
(S.D. Cal., 1972)
348 F. Supp. 1377 73, 74

United States v. DeCicco
(C.A. 2, 1970)
435 F.wd 478 88

United States v. Hart
(E.D.N.Y., 1971)
344 F.Supp. 522 74,75,76

United States v. Krulewitch
(C.A. 2, 1944)
145 F.2d 76, 336 U.S. 440 86

United States v. Poole
(7th Cir. 1967)
379 F.2d 645

United States v. Roberts
(2nd Cir. 1968)
388 F.2d 646 55,58

United States v. Sadrzadeh
(C.A. 9, 1971)
440 F.2d 389 73

United States v. Salazar-Gaeta
(C.A. 9, 1971)
447 F. 2d 468 73

United States v. Universal
C.I.T. Credit Corp.
344 U.S. 218, 73 S. Ct. 227
97 L. Ed. 260 92

United States v. Wilkins
(2d Cir. 1963)
326 F.2d 135 58

Williams v. Dutton
(5th Cir. 1968)
400 F.2d 797

Miscellaneous
McKissack, The Included Offense
Doctrine in California
10 U.C.L.A. Law Review 870 54,93

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No._____

WILLIAM ARTEMIS and
MICHAEL RAIFE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Petitioners, William Artemis and Michael Raife, respectfully pray for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review its judgment affirming judgments of the United States District Court for the Southern District of California, sentencing petitioners to

five years imprisonment and 10 years probation.

## OPINION BELOW

Trial in the Federal District Court was by jury.

The Opinion of the Court below is appended hereto as Appended hereto as Appendix "A", and is also found in the Clerk's Record of the Ninth Circuit Court. The Opinion of the Court below is, as yet, not reported. The judgment of the Court below is appended as Appendix "B". A copy thereof also appears in the Clerk's Transcript from the Circuit Court.

## GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The date of the judgment sought to be reviewed and the time of its entry is November 7, 1974. (R.C.A. Judgment).

The Petition for Rehearing was denied by the Court on February 11, 1975.

The Statutory provision believed to confer on this Court jurisdiction to review the judgment in question by Writ of Certiorari is 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED FOR REVIEW

I

Petitioners were denied their right to a speedy trial under the Sixth Amendment to the United States Constitution and the Due Process Clause of the Fifth Amendment to the Federal Constitution.

II

The Government's refusal to make available the identities, whereabouts and other impeaching information of its two key informant-accomplice-witnesses in advance of trial so that the defense could prepare its case denied Petitioners due process of law under the Fifth Amendment to the Unites States Constitution.

III

Petitioners were denied a fair trial by submission to the jury of statements of the primary government witness which were known to be false.

IV

The presentation, which was probably intentional, of evidence that the principal government witness had taken and passed a polygraph examination was incurable, prejudicial error.

V

Admission of hearsay evidence of an uncharged and unproved crime relative to the Forabosco painting deprived Petitioners of a fair trial.

VI

The consecutive sentences on Counts one and two are invalid as violative of the due process clause of the Fifth Amendment to the United States Constitution

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Involved are the Fifth and Sixth Amendments to the United States Constitution and 18 U.S.C. Sections 2 and 371, 2314 and 2315.

## STATEMENT OF THE CASE

This case commenced with the arrest of Petitioners Raife and Artemis in Las Vegas, Nevada (Clark County), on April 24, 1972. (R.T. 11, 34, 498-500). They were charged in the United States District Court in Las Vegas, Nevada, a Court of competent jurisdiction, on April 25, 1972, in Criminal - LV 2520 with violating Title 18, U.S.C., Sections 2315 and 2 (See augmentation). The indictment against them procured through essentially the same witnesses who testified in the trial this Court is about to review charged that they received, concealed and attempted to sell

and dispose of the same Van Gogh painting after it had moved in Interstate Commerce from San Diego, California, to Las Vegas, Nevada, knowing it to have been stolen. After trial commenced, the case was halted and the case was dismissed by the Government (R.T. 27, see augmentation). The Government then went forum shopping for a year and three months before returning an indictment in San Diego, California, where neither Petitioner resided and added a conspiracy count, left in the aiding and abetting charge and moved the statutory offense over one number to 18 U.S.C. §2314 (formerly the charge was 18 U.S.C. 2315) (C.T. 1-4).

The indictment was filed in the United States District Court for the Southern District of California on July 19, 1973, accusing William Artemis and Michael Raife in Count One of violating 18 U.S.C. §371

(the omnibus conspiracy statute) and 18 U.S.C. §2314 (Interstate Transportation of Stolen Property) as well as alleging the customary Aiding and Abetting Statute (18 U.S.C. §2) (C.T. 1-4). More precisely, Petitioners Raife and Artemis along with co-defendants Navarro and John Soares, a former co-defendant who pled guilty to the conspiracy offense, were charged with a conspiracy lasting from the 14th day of April, 1972, (the day Petitioners Raife and Artemis were arrested along with Government "special agent","informant", "accomplice" John Ray in Las Vegas, Nevada). The Conspiracy, as set out in the indictment, contemplated the transportation of the stolen painting to Las Vegas for purposes of possession until sale could be effectuated. Eight overt acts were alleged in support of the conspiracy encompassing the theft in San Diego and transportation of the painting

in question to Las Vegas and the ultimate offer to sell the painting to Federal Agents of the Alcohol, Tobacco and Firearms Division of the Department of the Treasury. Overt acts seven and eight explicitly allege the possession and attempted sale of the painting in Las Vegas, Nevada, by Raife and Artemis.

Count Two of the Indictment accused the foregoing persons along with the spouses of Soares and Navarro with causing the painting to be transported from San Diego, where it was stolen, to Las Vegas, Nevada, whereupon an attempted sale allegedly engaged in by Artemis and aided and abetted by Raife to undercover Federal Agents caused their apprehension. There was no attempt at any stage of the trial by the Court, Prosecutor, or anyone to isolate these two offenses which, although linguistically not identical, called into play the introduction of the same pattern of evidence.

An abundance of pretrial motions were filed and joined in by the various defendants including but not limited to motions for dismissal due to lack of a speedy trial, severance, a change of venue, discovery, a bill of particulars, disclosure of material witness informants, to suppress evidence and, with the exception of the discovery motions, were denied by the Trial Judge. At the onset of trial, the cases of John and Kathleen Soares were severed and a jury trial commenced on November 13, 1973. On November 16, 1973, the jury convicted Petitioners and co-defendant Navarro on both counts (C.T. 86-88). On January 14, 1974, the Trial Judge sentenced Navarro to five years incarceration on Count One, suspended Count Two and placed him on five years probation to run consecutive with Count One. Petitioners Raife and Artemis received identical sentences, namely five years on

Count One, the conspiracy count, and Ten Years Probation on Count Two to run consecutively with Count One. (C.T. 101-03). Notices of Appeal were timely filed, the record duly docketed, and the case was timely and properly before the Ninth Circuit Court of Appeals. All Petitioners are free on $15,000 bond. (C.T. 104-08). The Ninth Circuit in its Opinion,included as Exhibit "A", affirmed the judgment on November 7, 1974 and denied a Petition for Rehearing on February 11, 1975. The case is properly before this Court under 28 U.S.C. 1254(1).

## STATEMENT OF FACTS

Petitioners were charged in a two-count indictment with violations of 18 U.S.C. §371, conspiracy to transport a stolen Van Gogh painting in interstate commerce, and 18 U.S.C. §2314 and 2, the substantive offense of transporting the same painting and aiding and abetting the same. (C 1-4).

According to the chief Government witness John Ray, he was in post-arrest federal custody in San Diego on April 14, 1972, as a result of charges of violation of the Controlled Substances Act, 21 U.S.C. §801 et. seq. Bail, which had been fixed at $1,000, was posted on his behalf by one John Soares. Upon his release at 3:30 or 4:00 in the afternoon of that day, he went to a coffee shop near the courthouse where, after about an hour, he was joined by the Petitioners William Artemis and Michael Raife. Raife suggested to Ray that they

leave quickly as he and Artemis had just come off a "scooper", which meant that they had just stolen something. Artemis, Raife and Ray left in a 1972 Pontiac, driven and owned by Artemis, for Santa Ana.

Kathleen Soares, the wife of John Soares, testified that she and her husband had driven to San Diego from Santa Ana in the morning of April 14, 1972. They were accompanied by her two-year old son. Upon arrival at San Diego they met with a Mr. Nemser, the attorney for John Ray, and attended to posting $1,000 as bail for John Ray. She and her husband and son were in a VW. After making necessary arrangements for Mr. Ray's bail, they drove to the San Diego Fine Arts Museum, where they met with Artemis and Raife. Previous to this time both Artemis and Raife had visited the Soares' at their home and she had heard discussion of plans for stealing a Rem-

brandt painting from a museum by putting one person in a wheelchair and then concealing the painting in the wheelchair. On this occasion, John and Kathleen Soares and their child got into Artemis' car and drove around for a period of time. During that period, according to Mrs. Soares, a discussion was carried on between Soares, Artemis and Raife which dealt with stealing a painting from the Gallery. According to Mrs. Soares, her husband was to take the painting from its place on the wall while Raife and Artemis acted as lookouts.

Following this discussion, the three men walked off in the direction of the Gallery while Mrs. Soares waited in the car with her son. After the passage of one to two hours she saw the three men approaching the car. Soares got in and took a painting, which she identified as the Van Gogh, from under his shirt. He told her to wrap it in a corduroy coat and put it under the seat.

Also he instructed her to watch carefully as he was fearful that he had left fingerprints on the frame when he had removed the painting. Soares then drove the VW, containing his wife, child and the painting, to Santa Ana.

At some time after Soares and his wife had left for Santa Ana, Artemis and Raife met with John Ray at the coffee shop he had gone to after being released from custody. Those three then left, according to Ray, for Santa Ana in the Pontiac owned by Artemis. During the course of that trip Raife said they had just taken a Van Gogh painting.

Then, according to Kathleen Soares, she and her husband and child drove to the residence of co-defendant Rudolf Navarro, in Santa Ana. Upon arriving there, they left the Van Gogh with his wife, Carol Navarro, and then drove to their own home

in Santa Ana.

Shortly after the arrival of John and Kathleen Soares at their home in Santa Ana, Artemis, Raife and John Ray arrived there. The four men, Artemis, Raife, Ray and Soares retired to a back bedroom where a discussion was held. Ray, however, only remained there for a short period of time, perhaps a minute, according to Kathleen. According to Ray, he remained in the bedroom for some longer period of time and heard the other men discussing what to do with the painting and how the proceeds were to be split. Raife said that he had a buyer for the painting in Las Vegas. Soares, Ray testified, said that the painting was kept at Rudy Navarro's house and that they would go over there to pick it up.

Following thirty to forty-five minutes discussion in the bedroom, Artemis, Raife and Ray got into Artemis' car and Soares got into his own car. Both were driven to

the residence of Rudy Navarro. Upon arriva there, according to Ray, the Artemis car wa backed into the driveway and was stopped next to a side door to the house which exit into the driveway. Soares, meantime, had entered the house and, after a minute or two, he and Navarro each came out the side door carrying a painting. One of the paintings was identified by Ray as the Van Gogh which is involved in this case. They were wrapped, placed in the trunk of the Pontiac and Artemis, Raife and Ray departed for Las Vegas.

At some point in the proceedings up to that juncture Artemis and Raife, and perhaps Soares, had agreed to give Ray 10 percent of the proceeds received from sale of the painting if Ray could find a buyer therefor. Ray was unable to explain why this offer was made in light of the fact that Raife had already stated that he had a buyer in Las

Vegas.

The painting was taken to Las Vegas and Ray was dropped at his home. He attempted, on the day after his arrival, to contact Agent Macaulay of the Treasury Department. After the passage of three days, he was able to establish contact and Agent Macaulay came into Las Vegas. A plan was devised to have another agent, Riggs, pose as a buyer for art work from Texas. Finally, some ten days after the theft of the painting, Artemis, acting on a prearranged plan, went to a hotel room in Las Vegas bearing the painting with him in a brief case. He was arrested by Agents Riggs and Greenleaf. Raife, meantime, was downstairs in the lobby of the hotel where he was arrested by Agent Macaulay. Ray, who was also downstairs, was told by Macaulay to "get lost".

A criminal case was filed against Artemis, Raife and, as a sham, Ray in the

United States District Court for Nevada in Las Vegas. That case was subsequently dismissed long before the institution of the instant case.

At a pretrial conference in chambers, the United States Attorney, Mr. Thaller, indicated that, unless disavowed by the government at the time, the testimony of both John Ray and Kathleen Soares relative to any promises or concessions which may have been made to them would be adopted by the government as correct. (R. 93).

Kathleen Soares, an accomplice in the crime, according to the instructions given by the trial court, testified that the Van Gogh was delivered by her and her husband to the Navarro home late in the afternoon of April 14, 1972 (R 283, 746). At that time Mrs. Navarro inquired of John Soares if he wanted the painting put in the attic with the other one. John Soares, according to the testimony of his wife, said, "Yes, it's

okay with Rudy." (R 283). Prior to that time, in the course of arguing an objection at the bench, the trial court had indicated that it intended to admit hearsay evidence to show knowledge on the part of Mr. Navarro and his wife as to the stolen character of paintings claimed to have been stored by them. (R 147-148). The trial court granted a continuing objection to such questions. (id.)

In addition to the foregoing testimony, Kathleen Soares testified that she and her husband had been acquainted with the Navarros for a number of years and they saw each other socially from time to time. In addition, she was permitted to testify, over objection, that her husband had a business relationship with Rudy Navarro. That relationship, she testified, consisted of John Soares storing things at Navarro's house. (R 287-288). On cross-examination, Mrs. Soares stated that

her conclusion that Rudy Navarro was in the business of storing things for her husband was based on the fact that she and her husband had left the Van Gogh painting at the Navarro home and the fact that she had been told by her husband and Rudy Navarro that another painting, a Forabosco, was in Navarro's attic. (R 340). The trial court had previously granted a continuing objection to evidence relating to the Forabosco painting. (R 59-61, 67, 141, 148).

Finally, Kathleen Soares testified that she had visited with Carol and Rudy Navarro at their home in the summer of 1972. (R 294) She was certain that this conversation took place after June and before August. (R 398) And she was absolutely certain that she spoke during that visit to Carol Navarro. (R 399). According to Kathleen, Rudy Navarro stated that he did not know why John (Soares) sent the paintings to Las Vegas

with Artemis, Raife and Ray; that he had offered to buy them for a couple thousand dollars and hold them in his attic till the steam blew over. (R 294).

Navarro testified at a later point in the trial and stated that there had been no such conversation as the one related by Mrs. Soares. Mrs. Soares had conceded on cross-examination that she was aware that Carol Navarro had gone out of the country during the summer of 1972. (R 399). Mr. Navarro testified that his wife was in Europe between June 1st and August 1st. (R 629-630). The passport of Carol Navarro, showing departure from the United States on May 24, 1972, and return to the United States on August 2, 1972, was introduced into evidence as Defendant Navarro's Exhibit B. (R 630-631, 645).

Kathleen Soares was impeached by evidence that she had lied under oath to the Grand Jury investigating this case when she

testified before that body on June 6, 1972. (R 291-292). Mrs. Soares was named as a defendant in Count Two of the instant indictment. (C 4). However, on motion of the government at the beginning of trial, her case was severed from those of her co-defendants. (R 82). No pretrial motions were filed on behalf of Mrs. Soares. (R 4). The attorney for Mrs. Soares, Mr. Boles, a member of the Federal Defenders who had been appointed by the Court to represent her, was excused from the courtroom and was not present during any part of her testimony. (R 266). The testimony which she gave proved that she was an accomplice in the crime as a matter of law. (R 746). She testified that she had received no deal, agreement, offer of compromise or reduction in suit or sentence for her agreement to give testimony. (R 297). She admitted that she was hoping for leniency, but there had

been no promise that the case would be dismissed or that it would go easier at the time of sentencing. (R 310-311). According to her testimony, there was no indication by anyone connected with the government's side of the case that she would get some leniency. (R 356). In fact the case against Kathleen Soares was never brought to trial, but was dismissed on motion of the government. (R 791-792). Mr. Thaller, the Assistant United States Attorney, testified that he had not told Mrs. Soares that the case would be dismissed as to her. (R 692). Furthermore, according to his testimony he decided to tell Mrs. Soares' attorney that he intended to move for dismissal as to her only after she had completed her confession on the witness stand. (id.). Despite the fact that the requirements of Giglio v. United States (405 U.S. 150) had been pointed out to the United States Attorney (R 255), he testified that he could not say that some other agency

had not promised or suggested leniency to her. (R 692). The trial court apparently concluded, insofar as Mrs. Soares had testified to facts which implicated Carol Navarro, that the testimony of Mrs. Soares was not sufficiently credible to justify submission to the jury. (R 608-610). Thus, the trial court gave judgment in favor of Carol Navarro at the close of the prosecution case under the provisions of F.R. Cr. P. Rule 29.

John Ray testified that, following the discussion in the Soares' home of what to do with the stolen Van Gogh, he had driven with Artemis and Raife to the Navarro home. ( R 212). It was dark at the time. Artemis backed the car into the driveway of the home. John Soares, who had driven there in his own car, went into the home. The Artemis car was stopped near a porch light in the driveway.

About a minute after Soares entered the home, he came out the side door into the driveway. He was accompanied by Rudy Navarro and each was carrying a painting. (R 122). Someone at that point wrapped the two paintings in rubber matting and put them in the trunk of the car. Ray first testified that Soares and Navarrro wrapped the paintings (R 123), but at a later point he conceded that he did not remember whether he had done some of the wrapping (R 185), and at a still later point he denied having testified that Soares and Navarro had done the wrapping. (R 239).

Ray conceded that he has very weak eyes. (R 215). However, he pointed out in two places in his testimony that the identification of the Van Gogh painting which he made in the courtroom as the same one he had seen being put into the trunk of the Artemis car was aided by light from a porch light on the house. (R 212-122, 214).

After the paintings were put into the trunk, according to Ray's testimony, he and the four other men, Soares, Raife, Artemis and Rudy Navarro, stood at the trunk of the car and discussed the matter. Soares instructed Raife to sell the larger painting, a Forabosco, and to bring Soares' portion of the proceeds to Soares' mother and to bring Navarro's share to Navarro. ($ 150). Following that, Raife, Artemis and Ray got into the Pontiac and drove to Las Vegas. (R 151).

No defendant in the case was charged with theft or any other offense involving the Forabosco painting. Evidence was admitted, however, which tended to show that John Soares had "cased" the Hunt Wesson Library in early 1972 and had then stolen the Forabosco painting therefrom. (R 289-291). That painting, purportedly, was stored in Navarro's attic.

The evidence as to the hearsay statements of John Soares relative to the Forabosco painting was offered originally as an admission against interest on the part of John Soares. (R 146). The trial court then proceeded to admit the hearsay statement of John Soares that he had stolen a painting as evidence that the Navarros had knowledge of the stolen character of the painting. (R 148). Thus, the connecting link for this evidence, testimony from which the inference might have been drawn that John Soares informed Petitioners that either painting was stolen, was never supplied. There is no evidence in the record that Petitioners were present at any conversation at which the stolen character of the Forabosco was discussed.

An objection was made to receipt of evidence dealing with the Forabosco on the ground that it was actually an attempt to

introduce co-conspirator hearsay evidence which rested on an entirely different, uncharged and unproved, conspiracy. (R 145). That objection was overruled. (R 148).

Ray testified that he had previously been convicted of two felonies, a 1946 conviction under the Dyer Act for which he was sentenced to three years in prison and a 1972 conviction under the Controlled Substances Act for which he was sentenced to five years in prison. (R 168-169). Ray, like Mrs. Soares, testified that he had received no promises or representations from government agents relative to his own case in return for his efforts in this case. (R 173, 174, 180). Indeed, when it was pointed out that Mr. Ray had been sentenced to a five year term on his own case, which he started serving in July of 1972, the explanation which he supplied for his release on or before November of that same year was "I guess they didn't want me in

jail." ( R 194). However, he also testified that no one had ever told him anything about why he was required to serve only four months of a five year sentence. (R 247 By like token, not one soul on this earth was ever asked by him why only four months time was required on a five year sentence. (id.) The five year sentence was, according to Mr. Ray, for smuggling "four bags" of mini-bennies from Mexico into the United States. (R 168). Cross-examination developed that the "four bags" contained 175,000 pills, for which the maximum sentence was imposed.

Ray testified that while he was imprisoned at Terminal Island he was visited by Agent Macaulay. The agent merely wanted to see if Mr. Ray was all right, according to Mr. Ray. At no time during the course of that visit was any defendant involved in this case discussed nor was the painting involved discussed. (R 205-206). However,

the agent testified that this case was discussed during that visit; that Ray asked what was happening on it and whether it would come to trial. (R 530).

Additionally, Agent Macaulay testified that when he saw Ray he told him that he would exert efforts to obtain his release from prison. (R 553). The agent recognized Ray's earlier testimony to the contrary as having been false. Finally, the agent testified that, contrary to Ray's testimony, Ray had indeed been paid $350 by the government in February or March of 1972 (R 501, 551), and a further payment of $200 by the government in April of 1972. (R 556). Ray had testified specifically that he had received not one penny from any government source from January of 1972 up to the time of trial. (R 250). Nor, according to Ray, had he received any other sort of compensation of any sort from any government source.

(R 251). Ray testified flatly that he had never had a discussion with Agent Macaulay regarding reduction of the penalties to which he had been sentenced. (R 251).

Agent Macaulay testified to having made telephone contact with Ray on Tuesday, April 18, at which time arrangements were made with Ray for Macaulay to meet him in Las Vegas on Thursday following. Macaulay described Ray as a "special employee" of the government. (R 512). When Ray first contacted Macaulay he told him only of a Van Gogh painting. (R 249, 491).

Agent Macaulay had been employed for some four years with the Treasur Department and prior to that time had been employed with the Monrovia Police Department In the course of both employments he had testified in court well up into the hundreds of times. (R 544-545). During cross-

examination by counsel for codefendant Raife, the following exchange occurred:

Q But you don't know as a fact, do you, whether or not (Ray) took that painting, because you weren't there, were you?

A No, sir. HE WAS GIVEN A POLYGRAPH EXAMINATION AND PASSED IT. (Emphasis added.)

An objection was made and sustained and the jury ordered to disregard it. A motion for mistrial was made and denied. (R 514).

I

PETITIONERS WERE DENIED THEIR RIGHT TO A SPEEDY TRIAL UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE FEDERAL CONSTITUTION.

The decisive case in the area of the denial of a speedy trial or due process of law, which based on existing analysis are treated the same, is easily Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182 (1972). There a Habeas Corpus proceeding was brought alleging that the defendant's right to a speedy trial had been denied. In the most thorough discussion of the problem in Supreme Court history the Court took the bull by the horns and delved into the competing considerations essential to appropriately analyze this issue. The Court, pe Mr. Justice Powell, commenced its analysis

with the observation:

"Although a speedy trial is guaranteed the accused by the Sixth Amendment to the Constitution, this Court has dealt with the right on infrequent occasions. See Beavers v. Haubert, 198 U.A. 77, 25 S. Ct. 573, 49 L. Ed. 950 (1905); Pollard v. United States, 352 U.S. 354, 77 S. Ct. 481, 1 L. Ed. 2d 393 (1957); United States v. Ewell, 383 U.S. 116, 86 S. Ct. 773, 15 L. Ed. 2d 627 (1966); United States v. Marion, 404 U.S. 307, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971). See also United States v. Provoo, 17 F.R.D. 183 (D.Md.), aff'd, 350 U.S. 857, 76 S. Ct. 101, 100 L. Ed. 761 (1955). The Court's opinion in Klopfer v. North Carolina, 386 U.S. 213, 87 S. Ct. 988, 18 L. Ed. 2d 1 (1967), estab-

lished that the right to a speedy trial is "fundamental" and is imposed by the Due Process Clause of the Fourteenth Amendment of the United States. See Smith v. Hooey, 393 U.S. 374, 89 S. Ct. 575, 21 L. Ed. 2d 607 (1969); Dickey v. Florida, 398 U.S. 30, 90 S. Ct. 1564, 26 L. Ed. 2d 26 (1970). As Mr. Justice Brennan pointed out in his concurring opinion in Dickey, in none of these cases have we attempted to set out the criteria by which the speedy trial right is to be judged. 398 U.S., at 40-41, 90 S. Ct. at 1570. This case compels us to make an attempt." (407 U.S. 518, p. 2184-2185.

The facts of the case are bizarre and they alone (See the concurring Opinions of Justices White and Brennan) justified a

denial of Petitioner's request. The Petitioner, Barker, and his confederate Manning murdered an elderly couple. The evidence against Manning was stronger than against Barker although Manning survived two hung juries and two reversals before being convicted in his fifth and sixth runs through the gauntlet. There were sixteen motions for a continuance. Barker consented to the first twelve continuances and a couple of others. Only when his trial neared did he register his complaint that he was being denied an expeditious trial, and at that time the illness of the Sheriff and chief investigative officer served as a sufficient excuse for a continuance. The following precepts can be gleaned from this most important decision. The Court declined to hold that the defendant must demand his right to an early trial. No presumption of accord with a prosecutorial delay can spring from a barren record. The Court

acknowledged that:

> "(i)t is not necessarily true that delay benefits the defendant. There are cases in which delay appreciably harms the defendant's ability to defend himself." (407 U.S. at 526).

The Court further proclaimed:

> "A defendant has no duty to bring himself to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process." ibid

Then in a following footnote the Court observed that:

> "As a circuit judge, Mr. Justice Blackmun wrote: 'The government and, for that matter, the trial court are not without responsibility for the expeditious trial of criminal cases. The burden for trial promptness is not solely upon the defense. The right to a 'a speedy ... trial' is

constitutionally guaranteed and, as such, is not to be honored only for the vigilant and the knowledgeable." Hodges v. United States, 408 F.2d 543, 551 (CA 8 1969) (407 U.S. 530 at 2190, fn. 27).

The Court concluded by outlining its approach to the criteria which Courts should employ in resolving speedy trial-due process problems.

"The approach we accept is a balancing test, in which the conduct of both the prosecution and the defendant are weighed.

A balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express

them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion to his right, and prejudice to the defendant." (407 U.S. 530, 2191, 2192).

In commenting on the decisiveness of prejudice to the defense and the difficulty of demonstrating it, the Court had this to say:

"A fourth factor is prejudice to the defendant. Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will

be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown.

United States v. Ewell, 383 U.S., at 120, 86 S. Ct. at 776; Smith v. Hooey, 393 U.S. 374, 377-378, 89 S. Ct. 575, 576-577, 21 L. Ed. 2d 607 (1969). In Klopfer v. North Carolina, 386 U.S. 213, 221-222, 87 S. Ct. 988, 992-993, 18 L. Ed. 2d 1 (1967), we indicated that a defendant awaiting trial on bond might be subjected to public

scorn, deprived of employment, and chilled in the exercise of his right to speak for, associate with, and participate in unpopular political causes." (407 U.S. 533, p. 2193).

It has now become commonplace for the Courts to summarily remand speedy trial cases where there is no determined argument expressed by the prosecutor justifying pretrial delay and no defensible findings by the Court hearing the motion. It has even become unnecessary for the defendant to have urged the point before trial. See e.g. Campopiano v. United States (No. 71-1028) - lower court opinion 446 F.2d 869.

In Strunk v. United States, 93 S. Ct. 2260 (1973) Chief Justice Burger speaking for a unanimous Court struck down the Dyer Act conviction of a defendant due to a ten month delay between the date of indictment

and the date of arraignment. The Court declined to follow the novel approach of the 7th Circuit Court and award the defendant credit for time served and allow the conviction to stand, but instead concluded that under Barker v. Wingo, supra, the only remedy was an outright dismissal of the charges. It is true that due to the fact that the Government did not press the issue as to whether the Circuit Court ruled correctly the nation's highest tribunal did not explicitly reach the totality of the speedy trial issue. However, it reaffirmed the analysis of Barker v. Wingo, supra, and further opined:

> "The Government claimed that is has postponed prosecution because of petitioner's reference to Rule 20, and consequently, that a large portion of the delay which ensued was attributable to petitioner. The Court of Appeals

regarded this explanation as tenuous; it also rejected the lack of staff personnel in the United States Attorney's Office as a justification for the delay. The entire course of events from the time of arrest through the Court of Appeals plainly placed the Government on notice that the speedy trial issue was being preserved by the accused and would be pressed, as indeed it has been.

On this record, it seems clear that petitioner was responsible for a large part of the 10-month delay which occurred and that petitioner neither showed nor claimed that the preparation of his defense was prejudiced by reason of the delay. It may also well be correct that the United States Attorney was understaffed due to insufficient appropriations, and consequently, was unable to provide an

organization capable of dealing with the rising caseload in his office, especially with respect to criminal cases. Unintentional delays such as overcrowded courts or understaffed prosecutors are among the factors to be weighed less heavily than intentional delay, calculated to hamper the defense, in determining whether the Sixth Amendment has been violated but, as we noted in Barker v. Wingo, 407 U.S. 415, 531, 92 S. Ct. 2182, 2192, 33 L.Ed. 2d 101, they must

> "nevertheless ... be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant."

This served to reaffirm what the Court held earlier in Dickey v. Florida, 398 U.S. 30, 37-38, 90 S. Ct. 1564, 1569, 26 L. Ed. 2d 26 (1970).

"Although a great many accused persons seek to put off the confrontation as long as possible, the right to a prompt inquiry into criminal charges is fundamental and the duty of the charging authority is to provide a prompt trial."

The Court further declared:

"The speedy trial guarantee recognizes that a prolonged delay may subject the accused to an emotional stress that can be presumed to result in the ordinary person from uncertainties in the prospect of facing public trial or of receiving a sentence longer than, or consecutive to, the one he is presently serving - uncertainties that a prompt trial removes. Smith v. Hooey, 393 U.S., at 379, 89 S. Ct., at 577, 578; United States v. Ewell, 383 U.S. 116, 120, 86 S. Ct. 773, 776, 15 L. Ed. 2d 627."

(93 S. Ct. 2260 at 2263).

The Court finally stated in a pithy and highly germane footnote that:

> "It can also be said that an accused released pending trial often has little or no interest in being tried quickly; but this standing alone, does not alter the prosecutor's obligation to see to it that the case is brought on for trial. The desires or convenience of individuals cannot be controlling. The public interest in a broad sense, as well as the constitutional guarantee, command prompt disposition of criminal charges." (83 S. Ct. 2260 at 2263, fn. 2).

The Supreme Court for the State of California in the case of Jones v. Superior Court, 3 Cal. 3d 737, 91 Cal. Rptr. 578 (1971) enunciated principles of considerable significance parallel to Barker v. Wingo, supra. The Court which has develop-

ed a considered and considerable body of law on the Speedy Trial issue was confronted with the following factual situation: An undercover narcotics officer Andrews worked for five and one-half months on an undercover buy program during which he concealed his identity. Two months before surfacing he allegedly made a purchase of heroin from Jones, the Petitioner. When the buy program concluded the undercover officer and another narcotics officer launched a search for the heroin peddler. Officer Andrews made three spearate visits to the apartment where the sale occurred to no avail; he interrogated a woman who was present at the sale to no avail; he obtained the accused's home address and found nobody at home. He learned that the accused was attending classes at a Community Skill Center and staked out the premises on two distinct occasions without success. He,

finally, with the assistance of Officer Fesler, located the suspect and spoke with him over the phone. The defendant agreed to come to the station and turn himself in for the narcotics case. He didn't, although he told a friend that he had done so. The trial Judge held a hearing finding these facts to be true. A complaint was issued the day after the officer concluded his undercover work and two months and one day after he had purchased the heroin in his undercover capacity from the accused. The defendant was not arrested for 19 months. The Trial Court denied the defense motion to dismiss the case and found that the defendant had actual knowledge that he was wanted for the sale of heroin, nevertheless attempted to avoid process and had not demonstrated that this delay was unreasonable. The Supreme Court found that the defendant's rights to a speedy trial had been violated. Against the contention of

the prosecution that the statute of limitations was the appropriate point of reference in determining whether the defendant had been denied a speedy trial the Court resolutely set its face:

> "The Statute of Limitations. The argument has also been made that the guarantee of a speedy trial should not be applied to pre-arrest delays because the allowable period between the offense and initiation of prosecution is controlled exclusively by the applicable statute of limitations. The statute of limitations, however, cannot be invoked to curtain the self-executing constitutional guarantee of the right to a speedy trial. Although the statute of limitations is the primary legislative guarantee against bringing overly stale criminal charges, it is not the sole guarantee. It imposes an outside limit on the initia-

tion of a prosecution regardless of how justified the delay may have been. It does not, however, preclude judicial inquiry into the constitutionality of delays which occur within that period. If such inquiry were foreclosed, it would mean that the Legislature has determined the minimum standards required by the right to a speedy trial, and that this determination is binding on the courts. The judiciary, however, is the final arbiter of the meaning of the constitutional guarantee." (91 Cal. Rptr. 578 at 581).

As an elementary matter, the Statute of Limitations only deals with hopelessly stale claims prior to the bringing of an action. Once an action is filed as in the Raife-Artemis case in April of 1972, only the speedy trial and due process guarantees govern the duties of a prosecutor in bring-

ing a case to trial.

The Court concluded:

"The prejudicial effect of the delay on petitioner must be weighed against any justification for the delay. (People v. Wright (1969) 2 Cal. App. 3d 732, 736, 82 Cal. Rptr. 859; People v. Alvarado (1968) 258 Cal. App. 2d 756, 759, 66 Cal. Rptr. 41).

Petitioner was clearly prejudiced. The most obvious prejudicial effect of the long pre-arrest delay was to seriously impair his ability to recall and to secure evidence of his activities at the time of the events in question." (91 Cal. Rptr. 578 at 582).

As pointed out in the pretrial motions to dismiss the case or to restore venue to Las Vegas where the original litigation had commenced and to grant a severance, the charges against Petitioners Raife and

Artemis were virtually identical with those previously dismissed by the Government a year before (R.T. 7, 11-13, 23-32). The witnesses were fundamentally the same. The crucial witnesses, John Ray and the three Treasury Agents (whose responsibility by the way does not extend to the arrest of persons accused of the crime in question), were available at the first trial. The art curators and experts had travelled to Las Vegas to testify at the Grand Jury Hearing. No reasons of substance were furnished by the Prosecutor for the delay and retrial after the dismissals and no findings were made by the judge, although a brief was filed by counsel for one of the defendants and joined in by the others.

The equities for Artemis and Raife are compounded when we consider that the trial on virtually the same charges had actually begun in Las Vegas when the dismissals occurred. Jeopardy had almost attached on

charges in no significant measure different from those alleged here. This is one of the clearest cases of obtaining time without any reason and judicial forum shopping on record and this tribunal should not countenance such activity. Since the defense was that Raife and Artemis had not been in San Diego or in the vicinity of the place where the theft took place nor in Santa Ana, the alleged location of a temporary storage area, their best defense was an alibi. However, not being confronted with that question, and like many people, not keeping a daily diary of their activities, they were helpless against the onslaught of two time felon John Ray, who could walk out of prison with abandon at the behest of Federal Agents rather than serve his five year term for smuggling 175,000 pills into the country and Kathy Soares who hoped to and did have her case dismissed as a result of her testimony. Having testified under oath

before the Grand Jury that Aretmis and Raife were not involved and discovering that she ended up as a defendant in a criminal case a month later it was clear that her mission was to state a case which by its nature did not lend itself to denial. Only her husband, John Soares, himself pleading guilty subsequently, and therefore hardly in a position to testify, could have contradicted her testimony. Perhaps Carol Navarro could have but then the Prosecution need merely have charged her with another section such as the one dismissed against Raife and Artemis in Las Vegas, and her exoneration under Rule 29 would have proved meaningless. For a comprehensive discussion of the threat of multiple prosecutions which is integrally tied in with the speedy trial issue in this case see McKissack, The Included Offense Doctrine in California, 10 U.C.L.A. Law Review 870.

II

THE GOVERNMENT'S REFUSAL TO MAKE AVAILABLE THE IDENTITIES, WHEREABOUTS AND OTHER IMPEACHING INFORMATION OF ITS TWO KEY INFORMANT-ACCOMPLICE-WITNESSES IN ADVANCE OF TRIAL SO THAT THE DEFENSE COULD PREPARE ITS CASE DENIED PETITIONERS DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

It is axiomatic that a defendant has the right to the name and address of any informant whose identification might prove "relevant and helpful to the defense of the accused or essential to a fair determination of a cause." Roviaro v. United States, 353 U.S. 53, 60-61 (1957); United States v. Roberts (2nd Cir. 1968) 388 F.2d 646; United States v. D'Angiolillo (2d Cir.

1965) (Cert. Den.) 350 F.2d 453, 455, 380 U. S. 955; Portomene v. United States, 221 F.2d 582 (1955); People v. Garcia, 67 AC 57, 64 Cal. Rptr. 110 (1967); People v. Perez, 62 Cal. 2d 769, 44 Cal. Rptr. 326, 328 (1965); People v. Hammond, 54 Cal. 2d 846, 9 Cal. Rptr. 233 (1960); People v. Kiihoa, 53 Cal. 2d 749, 3 Cal. Rptr. 1 (1960); People v. Durazo, 53 Cal. 2d 354, 340 F.2d 594 (1959); People v. Williams, 51 Cal. 2d 355, 333 P.2d 19 (1958); People v. McShann, 50 Cal. 2d 808, 330 P.2d 33 (1958); People v. Scott, 259 A.C.A. 268, 66 Cal. Rptr. 257 (1968); People v. Montano, 244 Cal. App. 2d 555, 53 Cal. Rptr. 145 (1966); People v. Diaz, 174 Cal. App. 2d 799, 345 P.2d 370 (1959); People v. Alvarez, 154 Cal. 2d 694, 316 P.2d 1006 (1957); People v. Castiel, 153 Cal. 2d 653, 315 P.2d 79 (1957); People v. Lawrence, 149 Cal. App. 2d 435, 308 P.2d 821 (1957).

The rationale of these criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense. See People v. McShann, supra. If the prosecution refused to divulge the information the case must be dismissed. People v. Perez, supra; People v. McShann, supra.

Furthermore, it has been abundantly clear since the decision of Brady v. Maryland, 373 U.S. 83, 89 (1963) that the Government may not withhold evidence favorable to the accused whether done intentionally, negligently, or in good faith. The Court declared therein:

"We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due

process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

Numerous cases decided thereafter hold that the prosecution may not withold information which may materially affect the determination of guilt or innocence of a defendant. See e.g. Giles v. Maryland, 386 U.S. 73, 87 S. Ct. 1640 (1967); United States v. Wilkins (45h Cir. 1964) 331 F.2d 53; United States v. Poole (7th Cir. 1967) 379 F.2d 645; Orr v. United States (D.C. Cir. 1967) 38[illegible] F.2d 988; Hamric v. Gailey, (4th Cir. 1967) 386 F.2d 391; Jackson v. Wainwright, (5th Cir. 1968) 390 F.2d 288; Lorraine v. United S States, (9th Cir. 1968) 396 F.2d 339; United States v. Keogh (2d Cir. 1967) 391 F.2d 147; Lee v. United States (9th Cir. 1968) 388 F.2d 738; United States v. Roberts, (2d Cir. 1968) 388 F.2d 646. It has recently been held that "The right of the accused to have

evidence favorable to his defense cannot depend upon the benevolence of the prosecution". Williams v. Dutton (5th Cir. 1968) 400 F.2d 797, 800. And the same Court similarly opined:

> "It is now clear that Brady imposes an affirmative duty on the prosecution to produce at the appropriate time requested evidence which is materially favorable to the accused either as direct or impeaching evidence." (Emphasis supplied) At Page 800.

In Lee v. United States, supra, the Court refused to allow the prosecution to withhold the identity of a boy who may have been a percipient witness to a bank robber's escape -- although the prosecution denied that the witness' testimony would be favorable -- on the grounds that to require the defense to prove what the witness would say without access to a means for learning the identity of the witness would place too

heavy a burden on the defense.

Prior to the trial, defense counsel sought appropriately through motions to ascertain the identity of any material witness informants and any potentially exonerative material. (R.T. pp. 1-45). The prosecution shielded his informants until the eve of trial and left the defense with nothing more than almost a Jencks Act examination of the critical witnesses John Ray and Kathleen Soares when actually it should have been permitted ample time to investigate them and their stories in order to plan the defense. Obviously both were material witnesses to the case and their identities should have been divulged. The mere suggestion by the attorney for the Government that the witnesses were subjectively afraid and the quick stamp of approval by the trial judge to withhold their identity can hardly

muster up to whatever set of requirements are structured to justify abandonment of or an exception to Roviaro, supra, and denial of the exigent needs recognized by Brady, supra, which encompasses impeaching material within its ambit. Williams v. Dutton, supra.

The unreliability of the two Government witnesses Ray and Soares is apparent from the record and the need to have been able to investigate them rather than simply question them in the courtroom obvious. Manifestly, none of the Petitioners could have obtained the comprehensive hearing, often called a fair trial, to which they were entitled. Thus the case should be reversed and dismissed.

III

PETITIONERS WERE DENIED A FAIR TRIAL BY SUBMISSION TO THE JURY OF STATEMENTS OF THE PRIMARY GOVERNMENT WITNESS WHICH WERE KNOWN TO BE FALSE.

It seems clear that a conviction could not have been returned in this case in the absence of the testimony of the informant John Ray. Ray's credibility was, without question, the key issue at trial.

Ray was permitted to testify that although he had been sentenced on his own smuggling case to a five-year term which commenced in July of 1972, no one ever told him one word about why he was released after service of only four months. (R 247) 1/

1/ It was later developed from records of the proceeding involving Mr. Ray that he had appeared in court, without counsel, on September 29, 1972, at which time his sentence was modified to unsupervised probation. (R 680-682). Thus, if service of the sentence commenced sometime in July, the time actually served was less than three months. The transcript of that modification proceeding is in evidence. (R 686).

Ray also testified that he had never asked anyone why his sentence was abruptly cut short. Finally, Mr. Ray testified that when he was visited at Terminal Island by Agent MacAulay, the case agent in this case, that there was no discussion of the painting in this case. (R 206). All of the foregoing testimony was untrue and was known to the government to be untrue. (Cf. R 247 with R 553; R 206 with R 530).

Mr. Ray was also permitted to testify that from January of 1972 up to the time of trial that he had not received any compensation, not one penny, from any government source. (R 250). And, according to his testimony, neither had he received any other form of compensation such as free rent, reduced rent, food, clothing, or any thing of value from any government source during that period. (R 251). All of the foregoing also was false, for he had indeed been paid at least two payments by Agent

MacAulay of government funds, one of $200 and one of $350. (R 551, 556). In addition, MacAulay had taken him out to dinner in connection with this case. (R 541).

The government attorney, according to his agreement in chambers prior to commencement of trial, adopted all of Mr. Ray's false testimony. (R 93)[2/] The Government attorney contented himself with silently listening to Mr. Ray present perjured testimony and only after Mr. Ray had left the stand did the government see fit to offer testimony from Agent MacAulay in a half-hearted attempt to provide some explanation for Ray's incredible story as to how he was released from prison. On MacAulay's direct examination, he testified that he had not taken steps to effect Ray's early release because of Ray's efforts

---

2/ No effort was made to disavow the testimony "at that point."

in this case; rather, according to MacAulay, he had sought Ray's early release because of fears for Ray's safety, based on information he had supplied in another case. (R 500-501) 3/

The government also presented evidence on direct examination of MacAulay that $350 had been paid to Ray by the government for his efforts in the Jones case. That sum was paid to Ray in February or March of 1972, according to MacAulay.

The balance of Ray's perjured testimony had to be developed by cross-examination.

The broad, general legal principles applicable to knowing use of perjured testi-

---

3/ Even that testimony raises an interesting sidelight. The reason for seeking Ray's release, according to MacAulay, was that the indictment on the other case, Danny Jones, was to be filed. (R 501). "Since Ray was in prison", presumably at that time, the agent suggested he would be in some danger. The discrepancy between the release which was arranged and carried out in September relative to an indictment which was to be made public in November was never explained.

mony as a means of obtaining a conviction was well established. Giglio v. United States (1972) 405 U.S. 150; Napue v. Illinois (1959) 360 U. S. 259; Mooney v. Holohan (1935) 294 U.S. 103. Both Napue and Giglio make it clear beyond question that the evidence involved need not be that which goes to the merits of the action; rather, if credibility of a particular witness is in serious question, knowing use of false evidence relative to the credibility of that witness works a deprivation of due process.

Both Napue and Giglio are phrased in terms of prohibiting "the presentation" of known false evidence. 405 U.S. 108; 360 U. S. 269. The Napue Court spoke of a deprivation of due process occurring when the State,

> "although not soliciting false evidence, allows it to go uncorrected when it appears."

In the case at bar, there was indeed some use of the false testimony of Ray. The evidence was presented. The agent, according to his testimony, brought the falsity to the attention of the United States Attorney on several occasions. (R 551, 553, 556-557) No action was taken.

Indeed it is true that significant portions of the false testimony of Ray were later repudiated by Agent MacAulay in his testimony. However, it is obvious that all that does is to create a conflict in the testimony. It is clearly not the equivalent of disavowal of the testimony. Furthermore, it developed on cross-examination of the agent that he had knowledge of an additional $200 payment of government funds which had been made to Ray during the period in which Ray denied receipt of any government monies. (R 522, 556). Do Napue and Giglio mean only that the defendant is entitled merely to cross-examine and

develop impeaching evidence from another witness IF HE IS FORTUNATE ENOUGH TO DO SO?

It is suggested to the Court that those cases mean something more than that. It is suggested that they mean just what they say, namely, that the government is under an obligation to prevent the presentation of testimony which the government knows to be false. The most obvious way of doing this would be to bring the falsity of the testimony to the attention of the trial judge at the time it appears. Alternatively, it would certainly be no burden on the government attorney to set the record straight and to compel the government witness on redirect examination to recant his falsehoods. Failure to do so falls short of the mark set by both Napue in Giglio in two respects. Presentation of the false evidence followed by contradiction thereof leaves it open to the jury to

accept the false evidence and to reject that which contradicts it. But much more to the point, if the government attorney is permitted to let his perjurious witness step down without correction of the falsehoods, the very real possibility exists that some portion of the false testimony will not thereafter be exposed and brought to light.

Thus, the approach which was taken in this case was one of gamemanship. The witness lied and if you, Mr. Defense Attorney, can prove it by another witness, we will not deny it. But until you do that, we will sit at our table in grand silence. That interpretation of Napue and Giglio reduces them to nothingness. Due process was denied in this case by failure of the government attorney to, as he had agreed, disavow testimony from his chief witness which he knew to be perjured.

IV

THE PRESENTATION, WHICH WAS PROBABLY INTENTIONAL, OF EVIDENCE THAT THE PRINCIPAL GOVERNMENT WITNESS HAD TAKEN AND PASSED A POLYGRAPH EXAMINATION WAS INCURABLE, PREJUDICIAL ERROR.

During the cross-examination of Agent MacAulay by counsel for defendant Raife, the following exchange took place:

Q Did you ever ascertain, or did you investigate the possibility of John Ray being the thief with John Soares in the theft of that painting?

A Yes, sir; we did.

Q He didn't have anything to do with it, did he?

A No, sir.

Q But you don't know, as a fact, do you, whether or not he took that

painting, because you weren't there, were you?

A No, sir. He was given a polygraph examination and passed it.

MR. KAUFMAN: Your Honor, I would move to strike that answer.

MR. MONROE: Move for a mistrial, your Honor.

MR. KAUFMAN: Not responsive, inadmissible.

MR. MONROE: Your Honor, the agent knows better than that. It was intentional misconduct.

THE COURT: It may be stricken and the jury is instructed to disregard it.

MR. MORAN: Your Honor, I wonder if the Court has ruled on Mr. Monroe's motion for a mistrial?

THE COURT: A mistrial will not be declared. Your motion will be denied.

(R 513-514)

Following that exchange, trial counsel for Defendant Navarro, Mr. Moran, propounded a series of questions which were addressed to determining whether the officer's unsolicited and grossly improper statement had been made with knowledge of its wrongful character. (R 544-546). The trial court sustained an objection to that line of questioning. However, before the objection was sustained, the officer stated that he had testified in court somewhere between 25 and 100 times during his four years as a federal agent and he had, in addition, testified in court some number of times up into the hundreds when he took into account his previous employment with the Monrovia Police Department. Since the objection to the line of inquiry and the basis on which it was sustained was irrelevancy and immateriality, it is apparent that the trial court considered it of no concern whether the error was intentional or not. It is

suggested, for that reason, that it is appropriate here to discuss it on the basis that it was intentional on the part of the agent. Since most school children that watch television are aware that "lie detector" evidence cannot be used in court, it seems not unreasonable to assume that a federal agent with the years of experience that Agent MacAulay has would be similarly aware of the impropriety of such evidence.

Evidence relating the administration or the results of a polygraph examination has been uniformly rejected by courts in the Ninth Circuit. United States v. Salazar-Gaeta (C.A. 9, 1971) 447 F.2d 468; United States v. Sadrzadeh (C.A. 9, 1971) 440 F.2d 389. For an excellent review of the authorities on this point and a thoughtful discussion of the whole subject, see Judge Thompson's opinion in United States v. DeBetham (S.D. Cal., 1972) 348 F. Supp. 1377. Judge Thompson concluded, of course,

that present law did not permit the introduction of such evidence in the absence of a stipulation therefor. This Court summarily affirmed. 470 F.2d 1367 (1972).

It seems worthy of note, however, that even Judge Thompson considered the matter in the carefully limited context of a non-jury trial and with extensive foundational evidence presented as to the qualifications and expertise of the expert operator whose opinion was tendered in that case.

Counsel's research has disclosed a dearth of cases which have considered error of precisely the type being discussed. Indeed, most of the reported cases seem to deal with polygraph evidence which is tendered by the defendant in support of his own testimony. Many of those cases are collected in DeBetham. 348 F. Supp. 1379, fn. 1. United States v. Hart (E.D.N.Y., 1971) 344 F. Supp. 522, was a case in which the government's chief witness, a narcotics

dealer, "blurted out during cross-examination that he had taken a lie detector test." Further inquiry into this area developed that the test had indicated that he was lying. The District Court therefore declared a mistrial. The opinion goes on from that point to consider what effect such a test result should have in light of the duty of the government to reveal evidence favorable to a defendant under Brady v. Maryland (1963) 373 U.S. 83. Hart, therefore, is not a great deal of help with the instant problem because that is not its central concern. Nevertheless, the case does bear on the instant case because the fact is that the Court did not grant a mistrial for precisely the reason that it is urged a mistrial should have been granted in this case: A witness irrevocably put before the jury the fact that a mechanical test of the credibility of the chief witness had been made.

It may be observed that the reasons present in this case for granting a mistrial were considerably more compelling than were those present in Hart. Those reasons are:

1) The witness who made the error in Hart was a lay witness, a narcotics dealer, who presumably had nothing like the kind of courtroom sophistication that the trained and experienced government agent in this case did;

2) The error in Hart turned out to be not at all self-serving so far as the government is concerned; whereas the error in this case was nothing more than an unsolicited, and totally self-serving, usurpation of the jury's truth-determining function.

California law is apparently well established that evidence of the result of a polygraph test or evidence of the willingness or unwillingness of a witness to submit to such a test is inadmissible. People v.

Carter (1957) 48 C. 2d 737, 751-752; People v. Andrews (1970) 14 Cal. App. 3d 40, 45. Both Carter and Andrews deal with the situation presented in the case at bar, either the willingness or the fact of a prosecution witness having taken a polygraph test. Both cases were reversed. Furthermore, People v. Parella (1958) 158 Cal. App. 2d 140, 147, holds that admission of such evidence is error and it is not curable by a warning instruction. These cases, although not direct authority so far as this Court is concerned, would seem to be reasoned entirely consistently with existing federal authority and are suggested to be, for that reason, persuasive.

This case may be aptly analogized to the situation which was presented in Gibson v. United States (C.A. 5, 1966) 363 F.2d 146. In that case, a prosecution for violation of the Dyer Act, the investigat-

ing FBI agent was asked, "Do you know whether he stole the automobile or how he got it?" The answer, "I believe he did," followed. No objection was made to the agent's expression of opinion. Nevertheless, the Court of Appeals reversed, based on that error and the admission of certain hearsay evidence.

This case, it is respectfully urged, is far more extreme than Gibson. One might appropriately paraphrase Agent MacAulay's challenged testimony as follows:

Q Do you know if Mr. Navarro is guilty?

A Yes, sir.

Q How do you know?

A I have heard all of Mr. Ray's testimony and if it is true, there can be no doubt of Mr. Navarro's guilt.

Q Do you know that Mr. Ray's testimony is true?

A Yes, sir. He was given a polygraph examination and passed it.

It is, of course, no accident that the final answer hypothesized above is precisely the answer which Agent MacAulay did give.

The Ninth Circuit Court of Appeals conceded perfunctorily that this was error.

However, this Court perfunctorily regards the error as trivial when actually it went to the core of the law suit, meaning the veracity of John Ray. Thus, of the four topics discussed the 9th Circuit Court in its Opinion, Topic Two concludes that the Government did in fact disavow Ray's testimony, but omits to point out that disavowal was premised upon the testimony of Agent MacAulay, another witness, and the same witness who committed the error in Issue #3 by vouching for Ray's credibility due to his passing the Polygraph test. It is patently incongruous to conclude that the Government on the one hand advised the jury to disbelieve Ray using Agent MacAulay as the vehicle for that notification and yet

conclude that Agent MacAulay's illegal effort to bolster Ray's credibility by reference to his success in passing the Polygraph was harmless.

Finally, the 9th Circuit Court concluded that the Government was less than diligent in re-indicting Petitioners Artemis and Raife and bringing them to trial, but feels that Petitioners did not demonstrate sufficient harm to themselves besides the considerable span of anxiety involved (See 9th Cir. Op. Exh. "A", p. 2). As presented at Oral Argument, the Government's thesis was then, and has always been, that they need explain none of their derelictions as proscribed in Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182 (1972), but may merely rest upon the inability of defendants to specifically articulate precise damage to their case which depended upon so many inponderables. Petitioners contend that this Court's resolution of that issue will permit the Government to

bypass its constitutional duty to bring the defendants to trial speedily and without undue harassment in almost every case imaginable. Excepting such cases as deaths of material witnesses, our courts will be tempted to conclude that defendants are never harmed and, therefore, the Government may proceed willy-nilly and lackadaisically in its prosecution of criminal cases. We urge that such a result is not consonant with the teachings of the Fifth and Sixth Amendments and Barker v. Wingo, supra.

For all of the above reasons Petitioner's motion for a dismissal due to the lack of a speedy trial should have been granted.

V

ADMISSION OF HEARSAY EVIDENCE OF AN UNCHARGED AND UNPROVED CRIME RELATIVE TO THE FORABOSCO PAINTING DEPRIVED PETITIONERS OF A FAIR TRIAL.

It hardly needs statement that the first fundamental of due process is written notice of the charges which are made against a defendant in order that he may prepare his defense against such charges. In re Gault, 387 U.S. 1, 33 (1967). The indictment in this case refers to a Van Gogh painting entitled "Paysage de Brabant", and refers repeatedly to "the painting." (C 2-4). The indictment makes no mention whatever of any other described painting, nor does it use language of broader application, such as "the Van Gogh painting and another or others." Rather, the language of the indictment is specifically limited to the

Van Gogh painting upon which this conviction rests. Evidence was adduced, over continuing objection [4], that John Soares had stated to his wife in early April, 1972, that he had stolen a Forabosco painting from the Hunt Wesson Library. (R 290). The government attorney characterized the testimony as being an admission against interest by a conspirator in this case. (R 291). However, it is obvious from examination of the indictment that the Forabosco painting was not involved in the conspiracy charged. Furthermore, it seems amply apparent that the statement which was adduced (from Kathleen Soares) was objectionable on the ground of marital privilege. Although a number of objections were made to the evidence, the marital privilege objection was not made because Mrs. Soares' attorney

[4] Under the "ground rules" established by the trial court at the commencement of the trial and agreed to by all parties, an objection by one attorney was applicable to all defendants unless specifically disavowed. (R 85).

had been excused and was not even present while she presented her confession from the witness stand.

Nonetheless, Mrs. Soares went on to testify that her husband had told her at the same time that the Forabosco was stored in "Rudy Navarro's attic." Evidence then was presented, by way of John Ray, that this Forabosco painting had been, on April 14th, transported to Las Vegas. (R 150-151). It seems perfectly clear that presentation of this evidence had for its purpose the transparent one of simply getting before the jury trying the case a separate, uncharged and unproved crime. The reason for permitting such evidence, according to the trial judge, was to show knowledge on the part of the Petitioners that the Van Gogh painting was stolen. (R 148, 750).

The rule appears to be well established that when a defendant is on trial for a specific charged offense, evidence of

another distinct offense is inadmissible. Of course,that rule is subject to a number of exceptions, but it does not appear that any exception is applicable in the instant case. Teasley v. United States (C.A. 9, 1961) 292 F.2d 460; Sachs v. United States (C.A. 9, 1960) 281 F.2d 189. Existing authorities make it clear that the context in which such evidence is offered is of great importance in determining the propriety of its admission. The words of Judge Learned Hand are appropriate here:

> "As has been said over and over again, the question is always whether what it will contribute rationally to a solution is more than matched by its possibilities of confusion and surprise, by the length of time and the expense it will involve, and by the chance that it will divert the jury from the facts which should

control their verdict."

United States v. Krulewitch (C.A. 2, 1944) 145 F.2d 76, 80, rev'd on other grounds, 336 U.S. 440 (1949).

One highly significant factor to be considered in this case is the fact that the evidence of the other crime was presented in a fashion which precluded cross-examination thereon. That evidence was presented by Kathleen Soares as a statement which John Soares had made to her: "(John) told me that he had stolen a painting from the Hunt Wesson Museum --." (R 290). "He said it was stored in Rudy Navarro's attic." (R 291). John Soares, who was charged as a defendant in this case was obviously unavailable as a witness. Although Mrs. Soares vigorously denied that the government had made her any promises or inducements in exchange for her "cooperation" and her testimony, the fact that her own attorney delivered her to the United States Attorney, turned her over to

elicit a judicial confession of the very charges made against her and left the court-room while this was going on would seem to prove conclusively that either her appointed attorney was the most incompetent attorney in the United States or that in fact an agreement had been made, signed, sealed and agreed upon which would provide a dismissal for her if she testified to certain facts. She testified; dismissal followed.

Under those conditions, it seems perfectly apparent that there was no possibility of meaningful cross-examination relative to the statement which John Soares was claimed to have made.

The evidence was clearly hearsay. It was not a hearsay declaration of a co-conspirator because it had nothing to do with the charged conspiracy which was specifically limited to the Van Gogh, "Paysage de Brabant." Therefore, it was simply inadmissible hearsay evidence of

another crime which was presented simply to cast the aura of a "bad man" about Petitioners.

The courts have reversed earlier cases on the basis of improper admission of similar evidence. Lyda v. United States (C.A. 9, 1963) 321 F.2d 788, 795-796; Erwing v. United States (C.A. 9, 1961) 296 F.2d 320, 325. Perhaps the closest parallel to the case at bar can be found in United States v. DeCicco (C.A.2, 1970) 435 F.2d 478. DeCicco had stolen a substantial number of very valuable art objects form the home of a doctor in Pennsylvania. The stolen goods were stored with one Burke who, it developed, was an FBI informant. DeCicco was involved in this venture with one Gregory Parness. Paul Parness, Gregory's brother and an unindicted co-conspirator, was the principal government witness, he also being a paid FBI informant. Paul Parness was permitted to testify

that, shortly before the events charged in the indictment, he had arranged, for DeCicco, the sale of two stolen Utrillo paintings. Paul Parness testified that DeCicco admitted that he had stolen the paintings and had turned them over to Gregory Parness to sell. The evidence was purportedly admitted, with the same limiting instruction as was given in this case (435 F.2d at 482, fn. 4), to show intent. The Court of Appeals pointed out that the defense in that case, like the defense in this case, was based simply on whether or not the evidence given by the informant was credible. 435 F.2d 484. The Court there said:

> "Parness's story, if believed, leads ineluctably to the conclusion that the defendants knew what they were doing, for had any of the defendants admitted the facts testified to by Parness any claim that they were ignorant of the nature of the goods

or their intended destination for sale to a prospective buyer would be patently incredible."

435 F.2d 484.

The Court reversed and remanded the case.

The above quotation applies precisely to the case at bar, if one but substitutes "Ray's story" for "Parness's story." Thus, the evidence which was admitted in this case relative to the Forabosco painting was not only incompetent on its face, admission of it was prejudicially erroneous on the authority of DeCicco.

VI

THE CONSECUTIVE SENTENCES ON COUNTS ONE AND TWO ARE INVALID AS VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND WITHOUT FOUNDATION IN LEGISLATIVE INTENT.

The trial court sentenced Petitioners to five years imprisonment on Count One, the conspiracy charge, and to Ten Years probation to run consecutively on the substantive offense. (C.T. 102-103). Petitioners strongly urge that the consecutive sentences violate due process and are not supported by Congressional intent. In the absence of Congressional intent to punish both offenses, the Court adopts a policy of lenity. United States v. Clements (9th Cir. 1972), 471 F.2d 1253; Milanovich v. United States (1961) 365 U. S. 551, 81 S. Ct. 728, 5 L. Ed. 2d 773;

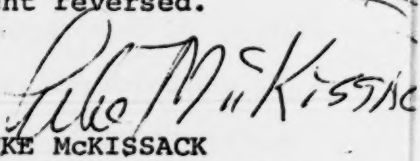
Heflin v. United States (1959) 358 U. S. 415, 79 S. Ct. 451, 3 L. Ed. 2d 407; Ladner v. United States (1958) 358 U. S. 169, 79 S. Ct. 309, 3 L. Ed. 2d 199; Prince v. United States (1957) 352 U.S. 322, 77 S. Ct. 403, 1 L. Ed. 2d 370; Bell v. United States (1955) 359 U.S. 81, 74 S. Ct. 620, 99 L. Ed. 905; United States v. Universal C.I.T. Credit Corp. (1952) 344 U.S. 218, 73 S. Ct. 227, 97 L. Ed. 260; In re Snow (1887) 120 U. S. 274, 7 S. Ct. 556, 30 L. Ed. 658; cf. United States v. Bass (1961) 404 U. S. 336, 93 S. Ct. 515, 30 L. Ed. 2d 488; Rewis v. United States (1971) 401 U. S. 808, 91 S. Ct. 1056, 28 L. Ed. 2d 493).

California which has in the last decade overhauled its thinking on the legitimacy and wisdom of sentencing for different statutes in the same statutory scheme or for both the conspiracy and the

completed offense prohibits dual sentences in the present situation. In People v. Prince, 268 Cal. App. 2d 398, 74 Cal. Rptr. 197 (1969) the Court set aside as illegal a sentence for conspiracy to commit theft and for the larceny itself. In People v. Gant, 60 Cal. Rptr. 252, 154 Cal. App. 2d 101 (1967) the Court prohibited sentences for both burglary and conspiracy to commit burglary. In People v. Blackwell, 256 Cal. App. 2d 313, 64 Cal. Rptr. 642 (1967) the Court invalidated sentences for both conspiracy to commit forgery and forgery as dual punishment. See the impartial analysis in McKissack, The Included Offense Doctrine in California, 10 U.C.L.A. Law Review 870.

## CONCLUSION

The Petition for Writ of Certiorari, Petitioners respectfully pray, should be granted and the judgment reversed.



LUKE McKISSACK
Attorney for Petitioners

# APPENDIX

DO NOT PUBLISH

# UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

| | |
|---|---|
| UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. RUDOLF NAVARRO, WILLIAM ARTEMIS, MICHAEL RAIFE, *Defendants-Appellants.* | Nos. 74-1502 74-1517 74-1518 MEMORANDUM |

[November 7, 1974]

Appeal from the United States District Court
for the Southern District of California

Before: CHAMBERS and HUFSTEDLER, Circuit Judges, and WHELAN, District Judge*

Testimony concerning the movements of the stolen Forabosco was admissible. Ample evidence was introduced to support a finding that Ray, Mr. and Mrs. Soares, Mr. and Mrs. Navarro, Artemis, and Raife were members of a conspiracy to steal and sell the Van Gogh. The conspiracy was active at the time Mrs. Soares said that her husband told her that the stolen Van Gogh could be stored with the Forabosco in Navarro's home. The reference to the Forabosco was not an allusion to an unconnected crime; rather, the context in which it was made indicates that it was a statement made in the course of and in furtherance of the conspiracy to hide the Van Gogh anteceding its transportation and ultimate sale. (*United States v. Roselli* (9th Cir. 1970) 432 F.2d 879.) The two paintings were stored together and transported

*Honorable Francis C. Whelan, Central District of California, sitting by designation.

together with the active assistance of all of these appellants. After the theft of the Van Gogh, the history of the two paintings and the parts that each appellant played with respect to both could not practically be separated. (*Cf. Hernandez v. United States* (9th Cir. 1966) 370 F.2d 171; *Armstrong v. United States* (9th Cir. 1964) 327 F.2d 189.)

The Government did not let Ray's testimony remain uncorrected. We perceive no error in the manner in which his testimony was corrected.

MacAulay's volunteered remark about Ray's passing a polygraph was error. MacAulay was an experienced witness, and he is not to be lightly excused for his unwarranted attempt to rehabilitate Ray. But the error was cured by the court's prompt cautionary instruction in the context of this case.

No out-of-court evidence was received by the jury. The light fixture was admitted into evidence. Jurors are not and cannot be expected to lock out of their minds their own experience or to be mute in discussing with other jurors in their deliberations their reasons for believing or disbelieving the evidence that they have received in court.

Artemis and Raife urge that they were denied their respective rights to a speedy trial. We have examined the facts in the light of the balancing test established in *Barker v. Wingo* (1972) 407 U.S. 514. We think that the record does not support the conclusion that the balance is properly struck in appellant's favor. The Government did not move very fast after it dismissed the original indictments, but there are indications that further investigation was a factor, and no prejudice to these appellants appears beyond the perpetuation of their anxieties during the interim from the first indictments to the second set of indictments.

No other point has sufficient merit to require discussion.

Affirmed.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 11-13-74—400

# In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1152

WILLIAM ARTEMIS AND MICHAEL RAIFE, PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend (1) that they were denied their right to a speedy trial; (2) that the government should have disclosed one month before trial the identities and previous statements of two informant-witnesses; (3) that the government knowingly permitted false testimony to be submitted to the jury; (4) that a government witness improperly testified that an informant had "passed" a polygraph examination; (5) that testimony about a second stolen painting was inadmissible; (6) that the imposition of consecutive sentences for conspiracy and the substantive offense denied them due process of law.

After a jury trial in the United States District Court for the Southern District of California, petitioners were convicted of conspiracy to transport a stolen van

Gogh painting in interstate commerce, in violation of 18 U.S.C. 371, and of the substantive offense of transporting the painting, in violation of 18 U.S.C. 2314 and 2. Each was sentenced to a term of five years' imprisonment on the conspiracy count and to a term of ten years' probation on the substantive count, the probation to run consecutively to the imprisonment. The court of appeals affirmed (Pet. App.).

The evidence at trial disclosed that in early April 1972 petitioners and John Soares met at the Soares' home and planned the theft of some paintings, possibly including a Rembrandt, from a San Diego art museum. They planned to transport these paintings to Las Vegas, where petitioner Raife said he had a potential buyer (Tr. 271-274). On April 14, 1972, John and Kathleen Soares[1] met in San Diego, California, with the attorney of John Ray (who was incarcerated on an unrelated charge) and arranged bail for him (Tr. 275). After posting Ray's bond, the Soares went to Balboa Park in San Diego and met petitioners (Tr. 276-278, 386-387, 389).

That same day, after planning the mechanics of the theft, petitioners and John Soares entered the San Diego Fine Arts Museum while Mrs. Soares waited in her automobile parked nearby (Tr. 279-281, 361-362). John Soares returned from the museum with a van Gogh painting, valued at approximately $80,000, concealed under his shirt (Tr. 281, 380, 438). The Soares, who left in their own car, took the painting to the home of Rudolph and Carol Navarro and left it with Carol (Tr. 282-283).

---

[1]In addition to petitioners, the indictment named John and Kathleen Soares and Rudolph and Carol Navarro. The cases of John and Kathleen Soares were severed prior to trial (Tr. 68-69, 82). John Soares later pleaded guilty to the conspiracy charge. The charges against Kathleen Soares, who testified for the government, were dismissed after the trial (Tr. 791-792).

The court granted Carol Navarro's motion for judgment of acquittal at the close of the government's case (Tr. 623). Rudolph Navarro was found guilty of conspiracy and of aiding and abetting the interstate transportation of stolen property (Tr. 780). His conviction has been affirmed on appeal (Pet. App.), and he has not sought certiorari.

After the theft petitioners met John Ray at a coffee shop in San Diego (Tr. 111-112). Petitioners and Ray then drove in petitioner Artemis's car to the Soares' home (Tr. 117). During this trip, petitioner Raife disclosed to Ray that they had just stolen a van Gogh from the "Balboa Art Museum"[2] (Tr. 118). At the Soares' home, petitioners and John Soares agreed to sell the painting; Raife suggested that he knew a "buyer" in Las Vegas, Nevada, who would take the painting (Tr. 120).

Petitioners and Ray then drove Artemis's car to Rudy Navarro's home and retrieved the van Gogh and another painting,[3] which they placed in the trunk of the car. The three drove to Las Vegas (Tr. 121-123, 151). A few days after they arrived in Las Vegas, Ray spoke with Special Agent Ian MacAulay of the Bureau of Alcohol, Tobacco and Firearms, for whom he had been an informant. MacAulay instructed Ray to tell petitioners that he had located an alternate buyer (Tr. 153-155, 491-492). Ray arranged a meeting between petitioners and the alleged buyer, Special Agent Riggs, who posed as a Texas art dealer (Tr. 154-160, 495-496). A price of $22,000 was agreed upon for the van Gogh. Riggs also expressed a desire to purchase the other painting, but petitioner Artemis said it would not be for sale until its value had been determined.

1. Petitioners contend that the delay between their offense and their trial denied them their rights to a speedy trial and to due process of law. However, whether this case is evaluated under the standards of *Barker* v. *Wingo*, 407 U.S. 514, or those of *United States* v. *Marion*, 404 U.S. 307, petitioners' claim is unpersuasive.

---

[2]The San Diego Fine Arts Museum is located in Balboa Park.

[3]This was a painting by Forabosco that John Soares had stolen earlier and had stored at the Navarro home (Tr. 290-294).

Petitioners' crimes took place during April 1972. They were arrested on April 24, 1972, and initially indicted in Nevada on May 9, 1972. This indictment charged that petitioners sold the stolen van Gogh, which had been transported in interstate commerce, in violation of 18 U.S.C. 2315. It did not allege that petitioners participated in the theft or the transportation. After a series of pretrial maneuvers by petitioners, and as the case was about to go to trial, petitioner Artemis entered a plea of guilty (Tr. 11-12). However, we have been informed by the United States Attorney that the judge scheduled to hear the case in Nevada expressed doubt about the government's ability to prove the interstate element of the offense and permitted Artemis to withdraw his plea. On February 28, 1973, before a jury was impaneled, the government dismissed the indictment without prejudice, pursuant to Fed. R. Crim. P. 48(a).

Several months of additional investigation followed, and the government discovered for the first time that petitioners were involved in the theft as well as the interstate transportation. A second indictment was returned on July 19, 1973, in California, the locus of the theft. This indictment charged not only petitioners but also the Soares and the Navarros, added a conspiracy count, and charged interstate transportation of stolen goods (18 U.S.C. 2314) rather than sale of stolen goods that had been transported interstate (18 U.S.C. 2315). After the district court had disposed of "[a]n abundance of pretrial motions" (Pet. 9), trial commenced on November 13, 1973, approximately one and one-half years after the crime.

Petitioners apparently urge that the delay was prejudicial because the passage of time diminished the opportunity to prove an alibi (Pet. 53-54). This claim is unsupported; petitioners do not point to any witness who was lost and do not claim that any memories faded. Indeed, their immediate arrest and initial indictment alerted them to the necessity of developing their defense and obtaining corroborative testimony.

We submit that most of the delay should appropriately be treated as pre-indictment delay under *Marion*; the charges in the second indictment are not the same as those of the earlier indictment. Petitioners have not alleged that the government unduly postponed the prosecution for the purpose of gaining an advantage over them, and have, therefore, failed to make the showing *Marion* requires. But even if petitioners' contention is assessed under the *Barker* speedy trial standards, it is unavailing because petitioners have not shown prejudice, because a substantial portion of the delay was necessary to resolve pretrial motions, and because most of the remaining delay was justified by the need for additional investigation.

2. Petitioners contend (Pet. 55-61) that the prosecution should have disclosed, a month prior to trial, the identities and statements of two witnesses, John Ray and Kathleen Soares.[4] Petitioners do not urge, however, nor does the record reflect, that the government withheld exculpatory evidence. Indeed, John Ray and Kathleen Soares were the principal government witnesses and implicated rather than exonerated petitioners. Since both informants testified at trial and were subject to cross-examination, and no exculpatory evidence was withheld, petitioners' reliance upon *Roviaro* v. *United States*, 353 U.S. 53, and *Brady* v. *Maryland*, 373 U.S. 83, is misplaced. Both of those cases involved information that was never made available, even during trial.

---

[4]One month prior to trial, the prosecution refused to disclose three statements of the informants and a summary of those statements, as well as their identity, present location, and "impeachment" material possessed by it (Tr. 37). The prosecution informed the court that these statements contained no exculpatory evidence and that the persons who gave them would be called as witnesses (Tr. 36-37). Upon the government's disclosure that one of the informants had been approached by an unnamed individual and feared for his safety, the court authorized the government to withhold the information at that time (Tr. 38-39).

In any event, the government made available to the defense extensive information well in advance of trial, and made available the statements of Ray and Soares one and one-half days prior to trial. In these circumstances, the court properly denied petitioners' initial motion for earlier discovery which, in view of the provisions of the Jencks Act permitting discovery or production of a government witness's statement only after the witness has testified (18 U.S.C. 3500), it had no power to grant.

3. Petitioners' contention that the government knowingly allowed perjured testimony to be submitted to the jury without correction (Pet. 62-69) is without support in the record. Ray initially testified that no one had discussed with him an early release from prison on a drug charge in exchange for his cooperation. He also denied having received compensation for his services as an informer, and he denied discussing the instant case with Agent MacAulay during a visit at Terminal Island (Tr. 205-206, 247, 250).

Immediately after learning from Agent MacAulay that Ray had testified falsely, the government put MacAulay on the stand to correct Ray's testimony (Tr. 501, 529-530, 553, 556).[5] The government did not engage in "gamemanship," as petitioners contend (Pet. 69). Agent MacAulay, on direct examination by government counsel, expressly repudiated Ray's statement that he had not received compensation from the government (Tr. 501). MacAulay also testified, contrary to Ray's version of the facts, that he had interceded on Ray's behalf to obtain his early release from prison on the drug conviction (*ibid.*).

---

[5]Without support for their assertion, petitioners also contend that government counsel was fully aware that Ray was testifying falsely while he was on the stand and that no action was taken when Agent MacAulay, whom the court had authorized to remain in the courtroom during the trial, informed the attorney that Ray had lied (Pet. 64-67). The record (as discussed in the text at pages 6-7) demonstrates the contrary and reflects decisive action by the government attorney as soon as he learned false testimony had been given.

Petitioners' statement that "[t]he balance of Ray's perjured testimony had to be developed by cross-examination" (Pet. 65) asserts more than the record supports. Although the government did not question MacAulay on direct examination about his discussion of the case with Ray at Terminal Island,[6] MacAulay, on cross-examination, expressly rejected Ray's version of the meeting (Tr. 529-530). The remainder of Ray's incorrect testimony had been corrected on direct examination of MacAulay. In light of the effort by the government to correct two aspects of Ray's testimony and the fact that Ray also testified as a witness for the defense, it is unreasonable to characterize this omission, as petitioners do (Pet. 67-69), as a knowing use of perjured testimony. All incorrect assertions in Ray's testimony were completely exposed to the jury. Nothing would be introduced at the second trial sought by petitioners that was not introduced at the trial they have already had.

4. Agent MacAulay, during cross-examination, volunteered that he believed Ray because Ray had "passed" a polygraph examination. This remark was inappropriate and unresponsive, but the error was cured by the court's prompt cautionary instruction (Tr. 513-514). Moreover, in light of the overwhelming evidence against petitioners, the improper testimony was harmless.

5. Some testimony during trial pertained to a stolen Forabosco painting, which had been stored at the Navarros' house and was transported (with the van Gogh) by petitioners to Nevada. This testimony was admissible. As the court of appeals correctly stated (Pet. App.):

---

[6]The record does not disclose that Agent MacAulay brought this particular discrepancy to the attention of the Assistant United States Attorney (Tr. 529-530, 553, 556).

The conspiracy was active at the time Mrs. Soares said that her husband told her that the stolen Van Gogh could be stored with the Forabosco in Navarro's home. The reference to the Forabosco was not an allusion to an unconnected crime; rather, the context in which it was made indicates that it was a statement made in the course of and in furtherance of the conspiracy to hide the Van Gogh anteceding its transportation and ultimate sale. (*United States* v. *Roselli* (9th Cir. 1970) 432 F.2d 879.) The two paintings were stored together and transported together with the active assistance of all of these appellants. After the theft of the Van Gogh, the history of the two paintings and the parts that each appellant played with respect to both could not practically be separated. (Cf. *Hernandez* v. *United States* (9th Cir. 1966) 370 F.2d 171; *Armstrong* v. *United States* (9th Cir. 1964) 327 F.2d 189.)

6. Petitioners finally assert (Pet. 91-93) that it was improper to impose consecutive sentences for the conspiracy and the substantive offense. As this Court recently has reiterated, however, the law of conspiracy is directed against evils separate from those accompanying the substantive crime, and separate punishments are permitted. *Iannelli* v. *United States*, No. 73-64, decided March 25, 1975.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

MAY 1975.

DOJ-1975-05